No. 85-1313

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JERSEY COAST EGG PRODUCERS, INC., a corporation of the State of Delaware,

Petitioner,

vs.

LOCAL UNION NO. 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA and DOUGLAS SAMUELS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

KENNETH I. NOWAK
ZAZZALI, ZAZZALI & KROLL
Attorneys for Respondents
Gateway One
Newark, New Jersey 07102
(201) 623-1822

JAMES R. ZAZZALI,
Of Counsel

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Opinions Below 2

Jurisdiction 2

Statutory Provisions 2

Procedural History 3

Statement of the Case 5

ARGUMENT—The Court should deny the Company's petition for a writ of certiorari because the Court of Appeals below correctly ruled that in labor arbitrations the parties bargained for a decision by the arbitrator under the collective bargaining agreement, and the decision as to what weight, if any, should be given to a municipal court judgment was for the arbitrator to decide, not a court; in this case the arbitrator's decision drew its essence from the contract based upon the evidence he heard, and his refusal to accord dispositive effect to the municipal court judgment was not manifest disregard of the law nor contrary to public policy 13

Conclusion 30

PAGE

Table of Authorities

Cases Cited

Aldens Inc., 61 LA (BNA) 663 (1973) 25

Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) 15-18

Application of Citizens of Day Care Center, Inc. v. Community Social Agency Employees Union, 59 A.D. 845, 399 N.Y.S. 2d 10 (App. Div. 1977) 24

Auxilliary Power Corp. v. Eckhardt & Co., 266 F. Supp. 1020 (S.D. N.Y. 1966) 24, 25

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d (1981) 14, 15, 17

Bell Aerospace Co. v. Local 516, United Automobile Workers, 356 F. Supp. 354 (W.D. N.Y. 1973) 20

Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 96 S. Ct. 3141, 49 L. Ed. 2d 1022 (1976) 29

Crooker v. United States, 620 F.2d 313 (1st Cir.), cert. den., 449 U.S. 857 (1980) 22

Dean Witter Reynolds Inc. v. Byrd, 53 U.S.L.W. 4222 (Sup. Ct. March 4, 1985) 28

Dickinson v. Heinhold Securities, Inc., 661 F.2d 641 (7th Cir. 1981) 27, 28

Fairchild & Co., Inc. v. Richmond, Fredericksburg & Potomac R. Co., 516 F. Supp. 1305 (D.D.C. 1981) 19

Fukaya Trading Co. v. Eastern Marine Corp., 322 F. Supp. 278 (D. La. 1971) 20

PAGE

Garner v. Grarusso, 571 F.2d 1330 (5th Cir. 1978) 22

Gilberg v. Barbieri, 53 N.Y. 2d 285, 441 N.Y.S. 2d 49, 423 N.E. 2d 807 (Ct. of App. 1981) 22, 23

ITT Continental Baking Co., 72-2 ARB (CCH) ¶8490 (1972) 26

John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) 15

Ludwig Honold, Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969) 20

McDonald v. City of West Branch, —— U.S. ——, 104 S. Ct. ——, 80 L. Ed. 2d 302 (1984) 15, 17

Mobil Oil Corp. v. Independent Oil Workers Union, 679 F.2d 299 (3d Cir. 1982) 11

Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594 (3d Cir. 1968) 18

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education, 654 F.2d 868 (3d Cir. 1981) 18

New York Ass'n For Retarded Children v. Carey, 456 F. Supp. 85 (E.D.N.Y. 1978) 28

Office of Supply Gov. of Korea v. New York Navigation Co., Inc., 469 F.2d 377 (2d Cir. 1972) 20

San Martine Companania De Nav. v. Saguenay Term. Ltd., 293 F.2d 796 (9th Cir. 1961) 19

Saxis Steamship Co. v. Multifacs Internat'l Traders, Inc., 375 F.2d 577 (2d Cir. 1967) 20

Sidarma Societa Italiana Di Armamento Spa, Venice v. Holt Marine Industries, Inc., 515 F. Supp. 1302 (S.D. N.Y. 1981) 20

PAGE

Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104 (W.D. Ill. 1980) 19, 20

Stockwell v. Reynolds, 252 F. Supp. 215 (S.D.N.Y. 1965) 28

Tipler v. Du Pont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971) 22

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 3 L. Ed. 2d 1424 (1960) 14-17

United States v. Agee, 597 F.2d 350 (3d Cir.) (en banc), cert. den., 442 U.S. 944 (1979) 22

United States v. Kwasniewski, 91 F. Supp. 847 (E.D. Mich. 1950) 22

Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953) 16, 19, 20

W.R. Grace & Co. v. Local Union No. 759, Internat'l Union of Rubber Workers, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983) 15, 16

Village of Valley Stream v. Local 342, 89 A.D. 2d 1016, 454 N.Y.S. 2d 461 (App. Div. 1982) 23, 24

Statutes Cited

N.J.S.A. 2C:20-2(b)(3) 5

N.J.S.A. 2C:20-3 ..... 3, 5

Penal Law of New York:

§240.25 22

PAGE

9 U.S.C. §9 2

9 U.S.C. §10 ..... 2, 4

28 U.S.C. §1291 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1441 4

28 U.S.C. §1738 15

29 U.S.C. §173(d) (Labor Management Relations Act) 14

29 U.S.C. §185 (Section 301 of the Labor Management Relations Act) 2, 4

Other Authorities Cited

F. Elkouri & Elkouri, "How Arbitration Works", (3d ed. 1981) 15

K. Davis, "Administrative Law Text", (3d ed. 1972), §18.02 22

Moore's Federal Practice (2d ed. 1980) §0. 405(1) 18

Restatement of Judgments (1942) §1 18

O. Fairweather, "Practice and Procedure In Labor Arbitration" (2d ed. 1983) 26

No. 85-1313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JERSEY COAST EGG PRODUCERS, INC., a corporation of the State of Delaware,

Petitioner,

vs.

LOCAL UNION NO. 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA and DOUGLAS SAMUELS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Jersey Coast Egg Producers, Inc., appellee below, has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. This brief is submitted on behalf of respondents Local 863, International Brotherhood of Team-

sters, Chauffeurs, Warehousemen and Helpers of America and Douglas Samuels in opposition to the petition. In this brief, Jersey Coast Egg Producers, Inc. shall be referred to as "the Company" and Local 863, I.B.T., shall be referred to as "the Union."

Opinions Below

The opinion of the court of appeals is reported at 773 F.2d 530 (3d Cir. 1985) and is set forth in the Company's appendix at Pa1 to Pa19.* The court of appeals denied the Company's petition for a rehearing in banc, and this denial is set forth at Pa41. The opinion of the district court is unreported and is set forth at Pa30 to Pa38.

Jurisdiction

The district court possessed original jurisdiction pursuant to 29 U.S.C. §185 (Section 301 of the Labor Management Relations Act) and pursuant to 9 U.S.C. §§ 9 and 10. The court of appeals possessed jurisdiction pursuant to 28 U.S.C. §1291. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Statutory Provisions

The statutory provisions involved in this matter are 29 U.S.C. §185 and 9 U.S.C. §§9 and 10.

---

* "Pa" refers to the petititioner Company's appendix.

Procedural History

This is an appeal from a decision of the United States Court of Appeals for the Third Circuit reversing the decision of the District Court for the District of New Jersey, which had vacated a labor arbitration award. The Circuit Court reinstated the arbitration award.

This case orginiated on March 6, 1984, when the Company discharged Douglas Samuels for allegedly selling one carton of eggs. The Union grieved the discharge. On March 14, 1984 the Company filed a complaint in the Municipal Court of Voorhees Township charging Samuels with theft of eggs, valued at $35.00, in violation of N.J.S.A. 2C:20-3. A non-jury trial on the charge was held on April 9, 1984 in the Voorhees Municipal Court. As a result of the trial, Samuels was found guilty and fined $50.00. No appeal was taken.

In the meantime, the Union's grievance was being processed and arbitration was scheduled for July 26, 1984. On July 12, 1984 the Company moved before the Superior Court of New Jersey, Chancery Division, to restrain the arbitration. On July 24, 1984 the Chancery Division, per Judge Henry R. Wiley, denied the motion. On July 26, 1984 the arbitration was held before Arbitrator J.J. Pierson. On September 11, 1984 the arbitrator issued his Opinion and Award setting aside the discharge (Pa43 to 50). On September 12, 1984 Judge Wiley dismissed the complaint which had been filed by the Company on July 12, 1984.

On September 17, 1984 the Union filed a petition to confirm the award in the United States District Court. On September 18, 1984 the Company filed a motion to vacate the award in the Superior Court of New Jersey, Chancery Division. On October 4, 1984 the Union removed the Company's motion to the United States District Court under 28 U.S.C. §1441, alleging as the federal statutes involved §301 of the Labor Management Relations Act, 29 U.S.C. §185, and 9 U.S.C. §10. On October 19, 1984 the Union's petition to confirm and the Company's (removed) motion to vacate were consolidated before Judge Thompson, U.S.D.J. On October 22, 1984 the Company moved to remand its motion to state court. The Union moved for summary judgment to confirm and the Company moved for summary judgment to vacate the award.

On December 3, 1984 the district court rendered an opinion from the bench (Pa20 to Pa38). That opinion denied the Company's motion to remand granted the Company's motion to vacate, and denied the Union's motion to confirm. The decision was docketed as an Order on December 5, 1984 (Pa39 to Pa40). The Union appealed.

On September 25, 1985 the court of appeals issued its decision reversing the district court's decision (Pa1 to Pa19). On November 7, 1985, the court of appeals in banc, denied the Company's petition for rehearing (Pa41 to Pa42). The Company then petitioned for a writ of certiorari.

Statement of the Case

Douglas Samuels was employed by the Company as a truck driver (Pa44). At the time of his discharge, he had been employed by the Company for 25 years (Pa48). On February 27, 1984 a customer informed the Company that he had observed Samuels take a carton of eggs from his truck and put it in the trunk of a car (Pa45). However, on that day the Company did not show a shortage of eggs (Pa47 to Pa48). Nonetheless, on March 6, 1984 the Company discharged Samuels for theft. The Union grieved.

One week later the Company filed a complaint against Samuels in the Municipal Court of Voorhees Township, charging theft of a case of eggs valued at $35.00 in violation of N.J.S.A. 2C:20-3. Under N.J.S.A. 2C:20-2(b)(3), this is a disorderly persons offense. A non-jury trial was held in the Voorhees Municipal Court in the afternoon of April 9, 1984. Samuels retained and was represented at the trial by an attorney. The Municipal Court found Samuels guilty of the theft and fined him $50.00. Samuels did not appeal.*

The grievance filed by the Union proceeded through the various steps and was scheduled for arbitration on July 26, 1984. On July 12, 1984 the Company moved in state court to restrain the arbitration, but Judge Wiley denied the motion. The arbitration proceeded on July 26, 1984.

---

* At oral argument before the district court, counsel for the Union, responding to an inquiry from the court, explained that Samuels, who was represented at the municipal court trial by a criminal attorney, not a labor lawyer, did not appeal because of the insignificant size of the penalty and the large amount of money his attorney advised him was entailed in pursuing an appeal, on top of the amount he already paid for trial (Pa21).

The arbitration was conducted pursuant to the grievance and arbitration clause contained in the collective bargaining agreement in effect between the Union and the Company (Pa51 to Pa70). Section 18 of the contract provides for the grieving of any dispute "concerning the interpretation or application of" the contract (Pa64). If the grievance is not resolved between the parties, the matter may be submitted to final and binding arbitration (Pa64). The contract further states that "[t]he Arbitrator shall decide cases in issue solely upon the provisions of this Agreement, and shall have no power to add to, delete from, modify or alter the provisions of this Agreement." (Pa65). The contract also provides that no employee shall be discharged by the Company "except for just and sufficient cause" (Pa66) and "[i]f the Union, in any case, contends that an employee was discharged without just and sufficient cause, then and in that event the validity of said discharge shall be submitted to arbitration in the manner provided for in Paragraph '18.' " (Pa66). Though the contract does not contain a "Management Rights" provision, the Company adopted a set of work rules. Included among these rules is a section calling for termination for, *inter alia,* stealing from the Company or its customers.

The arbitration of this case was by a full hearing into all of the facts surrounding the discharge. The Company called Irwin Moody, its controller and assistant general manager, and Steven Hartman, the associate supervisor of Acme Markets, who had reported the theft to the Company. The Union called John Braden, business agent of the Union, and Douglas Samuels, the discharged employee. During the testimony of the witnesses there was no discussion of res judicata, collateral estoppel, or any theory

of preclusive effects of a conviction. However, in its opening statement the Company did state Samuels had been convicted in municipal court and that the municipal conviction should "control." The Company provided the arbitrator with a copy of the transcript of the municipal court proceeding.

At no point in the arbitration did anyone, Union, Company or arbitrator, ever mention the words res judicata or collateral estoppel. There was no discussion or explanation of res judicata or collateral estoppel. The arbitrator never discussed those doctrines at all. No post hearing briefs were submitted.

The arbitrator set aside the discharge. In his award, issued September 11, 1984, the arbitrator began by noting that the Company had the burden of persuasion as to just and sufficient cause for the termination (Pa47). The arbitrator also observed that his function was to review the facts before him, weight the evidence, and assess the credibility of the witnesses (Pa47). Evaluating the record before him, the arbitrator concluded that the testimony of the customer who supposedly observed the theft was not entirely credible (Pa47 to Pa48). For example, even though the witness claimed the sale of eggs was made directly in front of him, he did not take down the license plate of the car into which the case of eggs was putatively placed and did not check the delivery to see if a case were missing (Pa47 to Pa48). Also, the arbitrator wondered why Samuels would sell a case of eggs at the customer's location in clear view of the customer (Pa47). Finally, the arbitrator found it difficult to determine exactly what, if anything, was stolen in light of the fact that no shortage was discovered (Pa48).

The arbitrator emphasized that his role is to judge the discharge based upon his authority under, and the standards imposed by, the collective bargaining agreement. Based upon the facts before him, the arbitrator concluded that the Company's March 6 discharge of Samuels was not for just and sufficient cause. As the arbitrator summarized:

> The employer, when contending that an employee has stolen or committed theft, must support that allegation of proof of loss. Herein, there was no proof of loss. Moreover, when considering that Mr. Samuels had spent over twenty-five years in the employ of the Company, there should have been produced more than a vague identification, specifically a definite description, of what was stolen. Without such, it is impossible for this Arbitrator to sustain a discharge on unconvincing identifications or a misdemeanor conviction.
>
> Based on the evidence presented, this Arbitrator has not been convinced that the Grievant did commit the act of theft on February 27, 1984. As such, based on this finding, this Arbitrator must hold that the Grievant did not violate the Company rule in paragarph 13 *and* that there was no just or sufficient cause for the discharge of the Grievant.

(Pa48 to Pa49). (Emphasis in original.)

The Union then moved in federal court to confirm the award and the Company moved in state court to vacate it. After the Company's motion was removed to federal court, the parties' motions were consolidated for consideration on cross-motions for summary judgment before

Judge Thompson, U.S.D.J. On December 3, 1984 the district court read its opinion.

The district court acknowledged that it was the arbitrator's award that was bargained for and that errors in law or fact by an arbitrator do not justify vacating the award (Pa34). Rather, noted the district court, there must be a "perverse misconstruction of the law in order to vacate an award." (Pa34). In order to overturn the award, it must first be concluded that the arbitrator erred as a matter of law, and second that the error "was in manifest disregard of the law" (Pa35). The district court then found that it was an error of law for the arbitrator to allow the relitigation of the theft. The district court observed that "the arbitrator was made aware of the conviction for theft in Municipal Court" and of the Company's rule against theft. In light of this, the district court concluded that the arbitrator's failure to give "dispositive" effect to the conviction was a "perverse misconstruction of the law." (Pa37).

For these reasons the district court granted the Company's motion to vacate the award and denied the Union's motion to confirm. An Order reflecting this decision was entered on December 5, 1985 (Pa39). The Union and Samuels appealed.

The Court of Appeals for the Third Circuit reversed, by a two to one decision, the decision of the district court. After fully reciting the relevant facts, including the fact that the Company discharged Samuels one month before he was found guilty in municipal court, the circuit court emphasized that it was the arbitrator's decision that the parties bargained for in their labor contract, not the de-

cision of some outside source. Thus the circuit court, citing Supreme Court decisions, noted that parties to a collective bargaining agreement choose to have disputes resolved by an arbitrator, that a court must defer to the arbitrator's award and may not substitute its own view, and that a court may not disturb an award for error of law (Pa5).

The circuit court explained that these parties had a collective bargaining agreement which provided for arbitration of all disputes and which further provided that discharges must be for "just and sufficient" cause. The arbitrator, carefully weighing and reviewing the evidence, concluded that the discharge was not for just and sufficient cause pursuant to the contract, but the district court set aside this award for manifest disregard of the law because the arbitrator declined to accord dispositive effect to the municipal court conviction. Without deciding whether collateral estoppel would apply to an arbitration (though suggesting in a footnote that it might not), the circuit court ruled that it was within the arbitrator's purview to determine the impact of the judicial finding in the collective bargaining relationship, and that a court may not superimpose its own views onto the arbitrator (Pa8). Thus the circuit court stated that:

> it remains the decision of the arbitrator, and the arbitrator alone, whether the misdemeanor conviction constitutes just cause for the dismissal under the terms of the collective bargaining agreement.

(Pa9).

Observing that the discharge occurred one month before the conviction, that the Company (according to the arbitrator) failed to prove any loss of product, that Samuels

was a 25-year employee, the appellate court remarked that it was for the arbitrator—not the court—to interprete the contract's "just and sufficient cause" requirement. Accordingly, it was a permissible interpretation of the award to say, under the facts of this case, that the misdemeanor conviction was not dispositive of just and sufficient cause for dismissal (Pa11). Therefore, the district court's vacatur of the award was in improper imposition of its views upon the arbitrator. As the circuit court summerized:

> The short answer to [the employers] contentions is that [it] agreed to leave to an arbitrator the resolution of disputes whether [just] cause existed for the discharge of any employee represented by [the union]. The arbitrator has ruled, and [the employer] is bound by that award.

(Pa12) (quoting from *Mobil Oil Corp.* v. *Independent Oil Workers Union,* 679 F.2d 299, 304 (3d Cir. 1982) (brackets as in decision).

In a concurring opinion, Judge Stapleton emphasized that the arbitrator correctly understood that the parties bargained for his decision as to whether the employee's conduct constituted just and sufficient cause for discharge under the contract (Pa12 to Pa13). Given that the contract called for an arbitral, rather than judicial, resolution of discharge issues, "it cannot be said that this interpretation of the arbitrator failed to draw 'its essence from the collective bargaining agreement.'" (Pa13).

Judge Aldisert dissented. Judge Aldisert opined that a municipal court conviction would be binding upon any

federal or state judge, including a justice of the United States Supreme Court, and therefore it should also be binding upon an arbitrator. Judge Aldisert stated that the conviction did not involve an area or issue requiring specialized knowledge of labor or experience in the law of the workplace. Accordingly, Judge Aldisert would require the arbitrator to follow the municipal court finding of guilt. Since the arbitrator acknowledged that theft constitutes a basis for discharge, the arbitration award (which reinstated the employee) must be vacated.

After the circuit court issued its decision reversing the district court and reinstating the award, the Company moved for rehearing before the full court. The full court denied this request, and an order on the mandate issued. The Company then filed a petition for writ of certiorari.

It is the respondent's position that this case does not present any novel theory of law requiring this Court's review; nor does this decision concern any issue of public import. This is simply another labor arbitration case in which the question is whether an arbitrator's charge is to construe and apply the collective bargaining agreement in effect between the parties or to add to that private contract the external laws of the legislatures and courts. As this Court has stated before, labor arbitrators are assigned to interpret the contract pursuant to which they were selected, and they are not chosen to enforce or apply external laws. For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARGUMENT

The Court should deny the Company's petition for a writ of certiorari because the Court of Appeals below correctly ruled that in labor arbitrations the parties bargained for a decision by the arbitrator under the collective bargaining agreement, and the decision as to what weight, if any, should be given to a municipal court judgment was for the arbitrator to decide, not a court; in this case the arbitrator's decision drew its essence from the contract based upon the evidence he heard, and his refusal to accord dispositive effect to the municipal court judgment was not manifest disregard of the law nor contrary to public policy.

Arbitration is intended to be the ready mechanism whereby labor disputes are resolved rapidly, informally, and economically by an arbitrator selected by the parties to the contract. In this case the contract provides for arbitration of all disputes, requires just and sufficient cause for discharge, and directs that the arbitrator decide the matter based solely upon the contract. Even though the arbitrator followed this contractual mandate and found no just and sufficient cause for the discharge of a 25-year employee, the award has been dragged through the courts. The result is that a March 1984 discharge, set aside by a September 1984 arbitration award, remains in the judicial sphere two years later, at enormous expense to all involved. Throughout it all, the Company's constant plea has been that the award it bargained for in its contract should be set aside, not because it contravenes the contract but because it differs from a decision by a municipal court judge. The court of appeals rightly eschewed that proposition.

As the Third Circuit correctly ruled, the parties agreed to a decision by an arbitrator who would rule under the contract, and it was for the arbitrator to assess just and sufficient cause and to determine what weight, if any, to accord to the findings of an external entity unrelated to the contract. This is not a novel proposition. Rather, it is fully consistent with this Court's repeated statements that arbitrations are not judicial proceedings and are not bound by external laws or judicial orders, that arbitrators have exclusive authority to determine issues such as burdens of proof and evidential rulings, and that courts should decline to review the merits of an award or superimpose their own views.

Any analysis of arbitration and arbitration awards must begin with recognition of its legislative authorization as the mechanism for final resolution of labor disputes. The Congress has legislated that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." Labor Management Relations Act, 29 U.S.C. §173(d). Consistent with this legislative mandate, this Court has emphasized that a labor arbitrator's award is legitimate only when it draws its essence from the contract, for she is "confined to interpretation and application of the collective bargaining agreement." *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 3 L. Ed. 2d 1424 (1960). If the arbitrator looks beyond the contract to outside sources, she exceeds the scope of the submission and her authority, and the award will not be enforced. *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S.

728, 744, 101 S. Ct. 1437, 67 L. Ed. 2d (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. As this Court explained:

> [A] proper concept of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obligated to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective bargaining agreement.

Gardner-Denver Co., 415 at 52 n.16 (quoting from the Harvard Law Review). More recently, this Court noted that arbitration awards are not judicial proceedings subject to the mandate of 28 U.S.C. §1738. *McDonald* v. *City of West Branch*, —— U.S. ——, 104 S. Ct. ——, 80 L. Ed. 2d 302, 307 (1984). In sum, labor arbitration is a congressionally authorized, self-contained, non-judicial system of resolving disputes in the workplace in an informal and expeditious manner based upon the parties' contract and the law of the shop. *Gardner-Denver Co.*, 415 U.S. at 58; F. Elkouri & Elkouri, *How Arbitration Works*, (3d ed. 1981) at 2-4. See also *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 550 (1964). The parties bargained for a decision by the arbitrator under the collective bargaining agreement, not for a decision imposed by some outside source, even if that source is a court. *W.R. Grace & Co.* v. *Local Union No. 759, Internat'l Union of Rubber Work-*

ers, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298, 306 (1983).

Not only (and perhaps because of) arbitrations' non-judicial origination in the private agreement of the parties, the courts have refused to impose on arbitrations the rules and procedures which mark judicial and quasi-judicial fora. Thus an arbitration award may be made without any explanation of reasons for the award. *Enterprise Wheel & Car Co.*, 363 U.S. at 598; *Wilko* v. *Swan*, 346 U.S. 427, 436, 74 S. Ct. 182, 98 L. Ed. 168 (1953). The arbitrator's concept of statutory requirements such as burden of proof, material fact, and the like cannot be reviewed. *Id.* Judicial doctrines such as election of remedies do not apply, and discovery, cross-examination, and testimony under oath are often unavailable. *Gardner-Denver Co.*, 415 U.S. at 49-51, 57-58.

It is clear that labor arbitrations are wholy outside the realm of judicial fora. The parties to a labor agreement have not contracted for the rule of some statute nor for the decision of a judge. They have bargained for an award by a mutually agreed upon arbitrator under and in accordance with a private contract, nothing more. Indeed, anything more would be contrary to the parties' agreement, except if they expressly provide otherwise in their agreement.*

---

* There are contracts which contain express provisions allowing or requiring the incorporation of external sources of law, thereby rendering those outside sources applicable in an arbitration. See *W.R. Grace*, 76 L. Ed. 2d at 306 n.8. However, the contract here does not contain any such provision. On the contrary, it expressly limits the arbitrator to the contract (Pa65).

In the instant case the parties received exactly what they bargained for: a determination under the contract by the arbitrator as to whether just and sufficient cause for the discharge existed. The arbitrator heard all of the testimony, reviewed the evidence (including the municipal court transcript and conviction), and ruled that just and sufficient cause for discharge did not exist. The award draws its entire essence from the contract, and for that reason should not be disturbed by the judiciary. In recognizing and applying this fundamental proposition of law, the Third Circuit was merely enforcing the standard established by this Court. *Enterprise Wheel & Car Co.*, 363 U.S. at 597. The Third Circuit's decision does not warrant review.

The dissent below complained that if a municipal court conviction could bind a Supreme Court justice, surely it would bind an arbitrator. Posed in this manner, the dissent's complaint has visceral impact, but upon more reasoned examination it fails. The ultimately dispositive fact is that an arbitration is not a judicial proceeding. *McDonald*, 80 L. Ed. 2d at 307. It is a private dispute-resolution system wholly separate from any judicial network and not encumbered by the rules and procedures of judicial or quasi-judicial proceedings. To remark that a Supreme Court justice might be bound by a lower court decision while an arbitrator is not does not demean the justice, for the justice is part of the judicial system while the arbitrator is not. As this Court has noted again and again, arbitrators, unlike judges or justices, are commonly not lawyers, and they hear cases commonly prepared and presented by non-lawyers. *McDonald*, 80 L. Ed. 2d at 308 n.9; *Barrentine*, 450 U.S. at 743; *Gardner-Denver Co.*, 415

U.S. at 57 n.18 See also *Newark Stereotypers' Union No. 18* v. *Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968).

That arbitrators are frequently not attorneys raises a practical reason for not requiring the application of collateral estoppel to arbitration. Res judicata and collateral estoppel are judicially created common law doctrines whereby the same parties who litigate a claim in one court of competent jurisdiction may be barred from litigating that same claim, or an issue contained therein, in a subsequent court. Restatement of Judgments, §1 (1942); *Moore's Federal Practice*, §0. 405(1) (2d ed. 1980). In order for these preclusive doctrines to apply, there must be an identity of parties (or their privies), causes of action, and issues, and they apply only if the claim or issue was distinctly litigated and directly determined contrary to the party against whom the preclusion is asserted. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church* v. *New Jersey State Board of Higher Education*, 654 F.2d 868, 876 (3d Cir. 1981). Determination of these prerequisites is often difficult enough for a court; the prospect of arbitrators having to grapple with these legal intricacies is frightening, and contrary to the informality and speed which should be the earmarks of arbitrations. Clearly it is best that arbitrators be left alone to hear and resolve cases solely under the contract, without the interdiction of judicial doctrines.

For all of the foregoing legal and practical reasons, the ruling and reasoning of the Third Circuit was correct: it is for the arbitrator to determine just and sufficient cause under the contract, and to assess how much weight, if any, should be accorded the municipal court conviction.

This arbitrator made his determination under the contract, and the parties should be bound by that award (Pa12).

However, even if this Court concludes that it was an error of law for the arbitrator to decline to accord dispositive effect to the municipal finding, that error does not warrant reversal of the award, for two reasons. First, an arbitration award may not be vacated for error of law but only for manifest disregard of the law, which did not occur here. Second, collateral estoppel is not an immutable doctrine of law uniformily applied in the arbitral setting; numerous court decisions reveal it to be a judicial creation subject to discretion, and arbitrators and courts have declined to apply it in arbitrations. Conversely, there are no decisions holding that an arbitrator must be bound by collateral estoppel. Consequently, this arbitrator's decision cannot be deemed to be in manifest disregard of the law. These two propositions will be elaborated upon here.

As the district and circuit courts below noted, an arbitration award may be overturned for manifest disregard of the law. See *Wilko,* 346 U.S. at 436-37. Manifest disregard of the law "must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *San Martine Compania De Nav.* v. *Saguenay Term. Ltd.,* 293 F.2d 796, 801 (9th Cir. 1961). In order to vacate an award on the ground of manifest disregard, the complaining party must establish that the arbitrator understood and correctly stated the law but proceeded to ignore it. *San Martine Compania,* 293 F.2d at 801; *Fairchild & Co., Inc.* v. *Richmond, Fredericksburg & Potomac R. Co.,* 516 F. Supp. 1305, 1315 (D.D.C. 1981); *Shearson Hayden Store, Inc.*

v. *Liang*, 493 F. Supp. 104, 108 (W.D. Ill. 1980); *Bell Aerospace Co.* v. *Local 516, United Automobile Workers*, 356 F. Supp. 354, 356 (W.D. N.Y. 1973); *Fukaya Trading Co.* v. *Eastern Marine Corp.*, 322 F. Supp. 278 (D. La. 1971). Moreover, this basis for upsetting an award is "severely limited." *Office of Supply Gov. of Korea* v. *New York Navigation Co., Inc.*, 469 F.2d 377, 380 (2d Cir. 1972); *Saxis Steamship Co.* v. *Multifacs Internat'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967); *Sidarma Societa Italiana Di Armamento Spa, Venice* v. *Holt Marine Industries, Inc.*, 515 F. Supp. 1302, 1306 (S.D. N.Y. 1981).*

Thus an arbitrator's award is in manifest disregard of the law only where the party seeking its vacatur establishes that the arbitrator understood and correctly stated the law but proceeded to disregard his own pronouncement. Yet there is no indication anywhere in the record that any of the requirements of this extremely narrow exception were met here. They were not.

At the arbitration there was only passing reference to, and absolutely no explanation of, the notion that the municipal court conviction was controlling. Counsel for the Company asserted that the state judge who refused to enjoin the arbitration expressed his belief that the arbitrator would have to adhere to the municipal conviction, but counsel for the Union correctly pointed out that that issue was never before the state judge, was never briefed

---

* The "manifest disregard" exception to judicial deference to arbitration suggested in *Wilko* arose in the context of a commercial arbitration. However, as Third Circuit has observed, there should be even greater judicial deference to a labor award. *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969).

to or decided by him, and that any such statements made by the judge were his own feelings. In any event, that judge noted that it would be up to the arbitrator to decide what weight to give the municipal conviction.* As to the law surrounding or defining res judicata or collateral estoppel and/or their application to arbitrations, *not one word was said by either party.* A review of the entire transcript of the arbitration shows that neither the phrase nor concept, no less the law of, "collateral estoppel" or "res judicata" was ever mentioned by anyone. There were no post-hearing briefs.

The district court did not find that the arbitrator understood and correctly stated the law but ignored it. Indeed, the district court appeared unconcerned with the arbitrator's actual knowledge of the law. Instead, the district court simply stated that the arbitrator knew of the municipal court conviction and should have given it dispositive effect. Rather than examine whether the arbitrator understood and correctly stated the law but ignored it, the district court superimposed on the arbitrator full knowledge of and familiarity with the doctrine of collateral estoppel and then set aside his award for failing to apply that doctrine.

This is not the appropriate methodology or test. In order to find manifest disregard of the law, a court would

---

* The Company persists in relying upon a statement made by the state court judge, Judge Wiley, when he denied the Company's motion to restrain arbitration. In dictum, Judge Wiley stated that his own "belief" is that once a court makes a fact determination, whether it be made by a magistrate or state court judge, that would be "the law of the case." But Judge Wiley added that "I think the arbitrator ought to determine these questions" and he declined to restrain the arbitration.

be obligated to first determine if the arbitrator knew the law but acted contrary to his knowledge; not whether he should have known and understood the law. Plainly stated, the arbitrator here did not act in manifest disregard of the law.

Perhaps more important, res judicata and collateral estoppel are not immutable principles of law which must always be applied. For example, under a variety of circumstances courts have refused to apply them in situations where it would not disserve the principle of finality. See, e.g. *Crooker* v. *United States*, 620 F.2d 313 (1st Cir.), *cert. den.*, 449 U.S. 857 (1980); *United States* v. *Agee*, 597 F.2d 350, 360 (3d Cir.) (*en banc*), *cert. den.*, 442 U.S. 944 (1979); *Garner* v. *Grarusso*, 571 F.2d 1330, 1336 (5th Cir. 1978); *Tipler* v. *Du Pont de Nemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971); *United States* v. *Kwasniewski*, 91 F. Supp. 847, 851 (E.D. Mich. 1950). See also K. Davis, *Administrative Law Text*, §18.02 (3d ed. 1972).

Illustrative of the limitations on the breadth of res judicata/collateral estoppel's application is a recent decision of New York's highest court. *Gilberg* v. *Barbieri*, 53 N.Y. 2d 285, 441 N.Y.S. 2d 49, 423 N.E. 2d 807 (Ct. of App. 1981). In *Gilberg* the plaintiff and defendant were involved in a scuffle. The plaintiff filed a complaint against defendant, charging violation of §240.25 of New York's penal laws, which is a petty offense. A non-jury trial was held in City Court, Mt. Vernon, New York, and defendant was found guilty. The plaintiff then filed a civil suit for assault and moved for summary judgment on liability, based on the criminal conviction. The trial and appellate court granted the motion, noting that the defendant had a full and fair opportunity to litigate the matter and that

collateral estoppel pertained. The Court of Appeals reversed. The Court stated that the determination when collateral estoppel should apply cannot be reduced to a simple formula; the issue is not whether the prior judicial proceeding was flawed, but whether it should be given conclusive effect. *Id.* 441 N.Y.S. 2d at 51. The determination should be based upon the "realities of litigation," including the size of the penalty, the prior forum, the quality of counsel, and differences in law. *Id.**

Moreover, there are judicial and arbitral decisions holding that res judicata and collateral estoppel do not apply to an arbitration. For example, in *Village of Valley Stream* v. *Local 342*, 89 A.D. 2d 1016, 454 N.Y.S. 2d 461 (App. Div. 1982), an employee of the Village/employer was arrested on and pled guilty to charges of sexual abuse,

---

* Interestingly, the court remarked that to unhesitatingly accord collateral estoppel effect to municipal court convictions could lead to the unwanted result of plaintiffs bringing criminal charges before instituting civil suits with the hope of obtaining a conviction and then marching into civil court and quickly moving for summary judgment. If these plaintiffs lose in criminal court they suffer no harm, for they were not party to the criminal suit and the standard of proof in the civil matter is lower, making a criminal acquittal less fatal than a conviction would be for a defendant. *Id.* at 52 It is not difficult to imagine the same scenario employed by companies in a labor setting. The rush to bring criminal charges and have the state prosecute the case would be too inviting to pass up, especially if a conviction meant a shortened and sure victory at arbitration and an acquittal means nothing at all. The instant case may well be an example of this very scheme. But this Court need not concur with the New York court's fears of abuse of the criminal court system. The mere existence of the *Gilberg* decision undermines the notion that the arbitrator manifestly disregarded the law in declining to give collateral estoppel effect to a municipal court conviction for a disorderly person's offense.

a first-degree felony, and served 60 days in prison with five years probation. After he pled, the employer fired him and the employee grieved. While the grievance was proceeding through the various steps on its route to arbitration, the employee filed for unemployment benefits with the state agency. A full hearing was held on the unemployment benefits claim and an Administrative Law Judge ruled that the employee had violated the employer's work rules, and he was denied benefits. At the subsequent arbitration of the discharge, the employer submitted the unemployment agency's decision as conclusive on the issue of the violation of the work rules. Nonetheless the arbitrator ruled in favor of the employee.

The Appellate Division upheld the arbitrator's decision over the assertion that the agency's decision was dispositive of the violation of the work rule. Refusing to give the agency decision conclusive effect, the court explained:

> In the within case, we are concerned with an arbitration proceeding pursuant to the provisions of a collective bargaining agreement, and it is conceded that the grievance was within the scope of the arbitration clause of such agreement. Accordingly, the question of the res judicata effect of the Unemployment Insurance Administrative Law Judge was properly for the arbitrator.

Vallage of Valley Stream, 454 N.Y.S. 2d at 462. Accord, *Application of Citizens of Day Care Center, Inc.* v. *Community Social Agency Employees Union,* 59 A.D. 845, 399 N.Y.S. 2d 10, 11 (App. Div. 1977). See also *Auxilliary Power Corp.* v. *Eckhardt & Co.,* 266 F. Supp. 1020, 1023

(S.D. N.Y. 1966) ("[T]he question what effect should be given the German [decision] is a question of interpretation committed to the arbitrator.").

In addition, there are numerous arbitral decisions which refuse to accord conclusive effect to criminal convictions. For example, in *Aldens Inc.*, 61 LA (BNA) 663, 665 (1973) the arbitrator, stressing the distinction between arbitration and a court, stated:

> No criminal proceeding may be submited to an Arbitrator whose selection and whose authority is derived solely from the provisions of a collective bargaining agreement. A penalty for engaging in a crime and/or a fine are prescribed by statute or ordinance. In a criminal proceeding the issue is whether an individual has violated a specific law. And if found guilty, he is punished as directed by law. Only courts of law, established and operating under statutes and ordinances, have the right to determine the innocence or guilt of an individual and to mete out the appropriate penalty.
>
> An arbitration proceeding involves an alleged violation of one or more contractual provisions, the interpretation and application of these provisions, the alleged violation of a long established and accepted practice or any act arising out of the employer-employee relationship. And this is true in an issue of employee termination.
>
> * * *
>
> *Even an employee discharged for theft is entitled to have his grievance considered in an arbitration proceeding whether he was found innocent or guilty*

> *for the same offense by a Criminal Court. An Arbitrator is not bound by the judgment in a criminal proceeding or by an administrative agency. See Kennicott Copper Co.,* 38 LA 93, *ITT Continental Baking Co.,* 72 ARB para. 8490, and *Sperry Rand Corporation,* 72-2 ARB parap. 8568. Whether an employee was discharged for just and proper cause is a matter to be decided from the nature of employee-employer relationship from contract provisions, from proper rules of conduct and from established and accepted areas. (Emphasis added).

Similarly, in *ITT Continental Baking Co.*, 72-2 ARB (CCH) ¶8490 (1972) at 4700, the arbitrator stated that "an Arbitrator who considers a case should not be bound by a judgment of conviction or acquittal, or for that matter, a determination by an administrative body, in deciding the case before him. [citation omitted]."

Again, in an unreported arbitration decision published in a basic text on arbitration, O. Fairweather, *Practice and Procedure In Labor Arbitration* (2d ed. 1983), at 271-72, the arbitrator stated:

> the Court of Special Sessions made its findings under the criminal code . . . The arbitrator must make his findings under the contract and within the rules of the forum over which he presides. He cannot be limited to the acceptance of the court's holding or acquittal as dispositive of the issues before him. It can well be that one may not be guilty of a crime and yet have conducted himself in a manner that has given sufficient cause for discharge under the collective bargaining greement. *There can be*

> *situations of conviction of criminal conduct which may not be sufficient to justify sustaining a dismissal under a collective contract. The company in the former and the collective bargaining representative in the latter cannot be denied the opportunity to present its own case in arbitration and as a matter of contract application under the criteria agreed upon by the parties.* (Emphasis added).

The foregoing judicial and arbitral decisions all stand for the proposition that a judicial or quasi-judicial decision need not, as a matter of law, be given collateral estoppel or res judicata effect in an arbitration. Nonetheless, the Company argues that the arbitrator acted in manifest disregard of the law when he failed to give conclusive effect to the municipal court conviction. This is simply not supported by the case law. Though collateral estoppel may be central to the Company's legal iconography, the existing law plainly does not preclude the arbitrator from according the criminal conviction whatever weight or effect he deems appropriate.

The district court cited only one case in support of its conclusion that the arbitrator must give dispositive effect to the municipal conviction, and that was *Dickinson* v. *Heinhold Securities, Inc.*, 661 F.2d 641, 644 (7th Cir. 1981). That case is hardly convincing for that proposition. In *Dickinson* the plaintiff and defendant brokerage firm had an agreement, containing an arbitration clause, allowing defendant to trade stocks for plaintiff. Plaintiff claimed violations of the agreement, the defendant sought arbitration, and the plaintiff filed suit in federal court alleging violations of federal securities laws, misrepresentation, and tort and contract claims. The district court denied a

request for a stay of the court proceeding pending arbitration and instead ruled that it would decide all claims, both the non-arbitrable and the arbitrable. The circuit court reversed for various reasons, only one of which is relevant here. The circuit court noted that one predicate for the decision below was the (now defunct) "doctrine of interwining" under which a court faced with arbitrable and non-arbitrable claims which are inextricably entwined decided all of the issues and denied arbitration. The circuit court stated that arbitration could proceed and that the duplication of hearings was tolerable. As to this latter factor, the court obliquely observed that where there is inextricable intertwining permeating the federal suit, the court could make explicit and detailed findings of fact which may be used in a subsequent arbitration between those same parties. *Id.* at 644. But this is hardly support for the conclusion that a municipal court trial for a disorderly person's offense between the state and an employee *must* be given dispositive in a subsequent labor arbitration between the union and employer. Moreover, one must approach the reasoning in *Dickinson* regarding the relationship between a court proceeding and arbitration with extreme caution in light of this Court's recent rulings. See *Dean Witter Reynolds Inc.* v. *Byrd*, 53 U.S.L.W. 4222 4224 and n.9 (Sup. Ct. March 4, 1985).

Nor do the cases cited in *Dickinson* support the idea that an arbitrator must give dispositive effect to a court decision. In *Stockwell* v. *Reynolds*, 252 F. Supp. 215, 220 (S.D.N.Y. 1965) the court noted that a federal court trial would "doubtless" have "bearing on the subsequent arbitration. In *New York Ass'n For Retarded Children* v. *Carey*, 456 F. Supp. 85, 96 (E.D.N.Y. 1978) the court ruled that the parties to a labor contract bar-

gained for a decision by the arbitrator, not a court, despite some New York cases holding that an arbitration award has collateral estoppel effect on a subsequent civil action brought by the same party as in the prior arbitration. In *Buffalo Forge Co.* v. *United Steelworkers,* 428 U.S. 397, 412, 96 S. Ct. 3141, 49 L. Ed. 2d 1022 (1976) the issue was whether one party to a labor contract with an arbitration cause could obtain an injunction rather than arbitrate. The Court answered this in the negative, emphasizing that the parties contracted to arbitrate, not litigate. The parties "have not contracted for a judicial preview of the facts and law." 428 U.S. at 411. In the sentence most helpful to the Company here, the Court frowned upon judicial interpretation of contracts, for they might differ from the arbitrator's interpretation and the arbitrator might be heavily influenced or wholly pre-empted by the court proceedings on the injunction. *Id.* 428 U.S. at 412. Again, this remark does not rise to the level of a conclusion that an arbitrator must give dispositive effect to a municipal court conviction. Indeed, the remark was made in the context of a desire to retain the independence of the arbitrators.

Even if these cases do provide some vague support for the Company's theory, they are more than counterbalanced by the judicial and arbitral decisions cited above which unambiguously hold that a labor arbitrator is *not* bound by the prior conviction. The best that can be said for the Company's position is that it may have inferential foundation in some cases, though it is manifestly contrary to several judicial and arbitral decisions. But this hardly justifies the vacatur of the award as in "manifest disregard of the law." Giving the Comany every benefit of the doubt, there is simply no avoiding the conclusion that the

Company's perception of collateral estoppel and its relation to arbitration is but one of several. That does not warrant either the retroactive superimposition of this doctrine on the award or its vacatur for manifest disregard of the law.

Paraphrasing the Third Circuit, the Company got what it agreed to in its contract—an award by an arbitrator selected pursuant to, and charged with determining just cause under, that contract. The award in this case correctly draws its essence from the contract and was therefore properly upheld by the circuit court. The Company's effort to replace the arbitrator's award with a judicial determination is contrary to the law surrounding and philosophy of labor arbitrations. In any case, the foregoing judicial and arbitral decisions make plain that the arbitrator's treatment of the municipal court conviction was not in manifest disregard of the law.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

ZAZZALI, ZAZZALI & KROLL
Attorneys for Respondents

By: KENNETH I. NOWAK